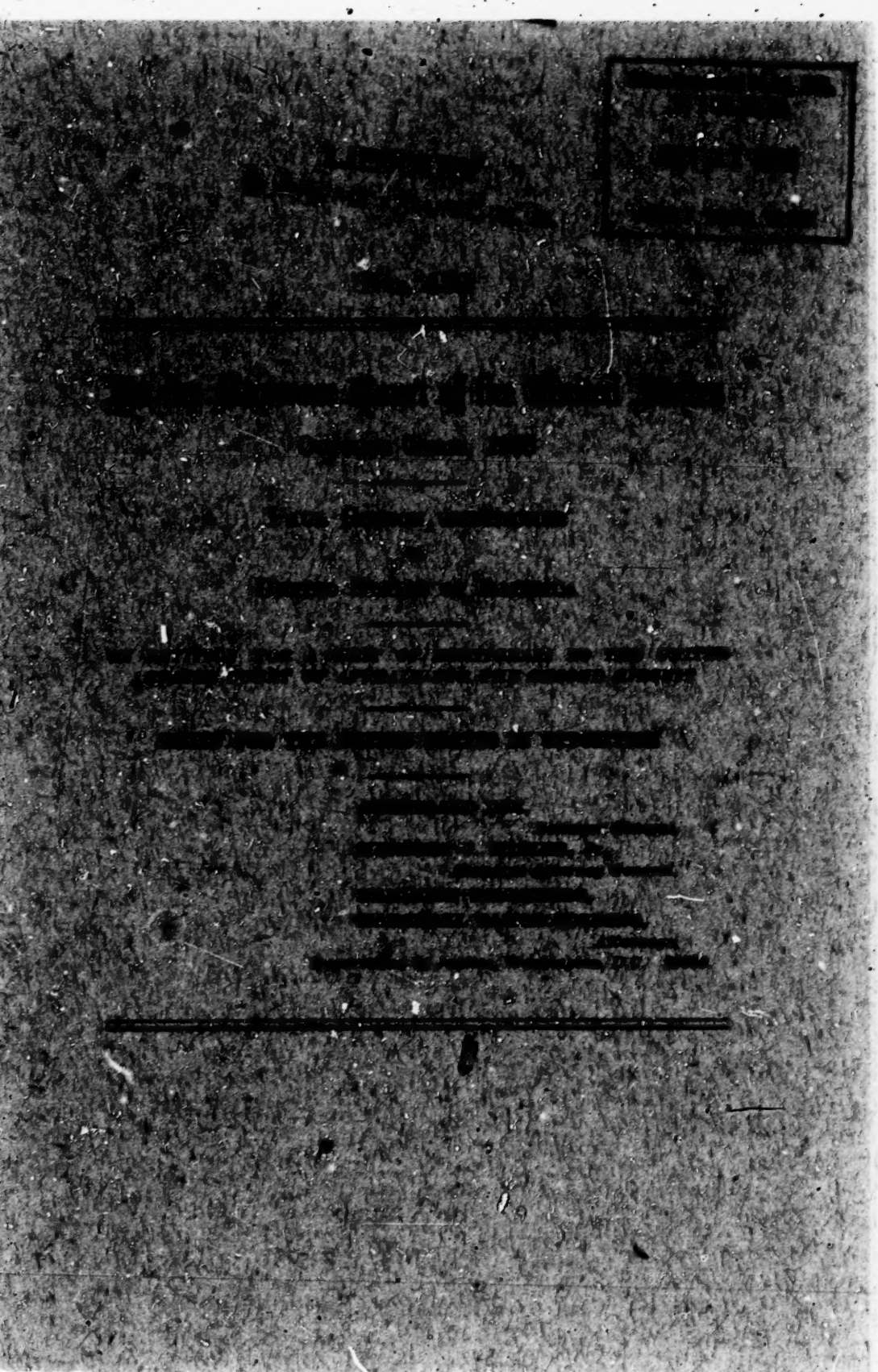


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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 431

PAUL GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1963. On August 6, 1963, Mr. Justice Brennan extended petitioner's time to file a petition for a writ of certiorari to and including September 3, 1963. The petition was filed on September 3, 1963. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to sustain the jury verdict.

2. Whether petitioner was deprived of a fair trial

by the admission of certain testimony of doubtful relevance.

STATEMENT

Petitioner was convicted, after trial by jury, of having unlawfully caused the mails to be used to send a confirmation of purchase of 300 shares of stock in Mark, Inc. to Hazel, Mae and Sam King in pursuance of a scheme and artifice to defraud, in violation of 15 U.S.C. 77q(a) and 77x. He was sentenced to imprisonment for six months.[1]

1. Petitioner was employed as a telephone salesman by Kimball Securities, Inc., which was described by its secretary-treasurer (who had been indicted and pleaded guilty) as a "boiler room" (R. 2953–2954).[2] Kimball sold shares only in Mark, Inc., its predecessor and successor (R. 2955, 2957, 3231), although it would sell other stock for customers if the proceeds were to be applied to a purchase of Mark stock (R. 2956). The company purchased mailing lists and sent out "teasers", *i.e.*, descriptive literature intended to arouse the recipient's interest (R. 2959–2960). An example was a brochure describing "How a $55-a-week teacher made one million dollars in the stock market" (R. 2963). Those who responded were then called by telephone salesmen who attempted to make sales of

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[1] Three other counts, one of which was a conspiracy count, were dismissed by the court at the close of the Government's case (R. 3356, 3365, 3369). A co-defendant, Howard Ross, was also convicted on one count and sentenced to one year's imprisonment. His conviction was affirmed at the same time as was petitioner's, and his petition for certiorari is before this Court as No. 327, this Term.

[2] "R." indicates the pencil numbering from the court of appeals record.

the stock (R. 2964). There were two types of salesmen: the "opener", who made the initial sale, and the "loader", who, after more teaser literature was sent, attempted to increase the sales to each buyer (R. 2965). Petitioner was employed as an "opener".

To prepare their sales approach, the salesmen were given the same descriptive literature to read that was sent to potential customers (R. 2971). They were not, however, supplied with either balance sheets (R. 2976) or profit or loss statements of Mark, nor were they told that Mark had any earnings (R. 2977). Mark never paid a cash dividend, and the salesmen were never told that any was contemplated (R. 2978). Mark was never listed, nor was any application ever made for it to be listed, on either the New York Stock Exchange (R. 3313) or the Pacific Stock Exchange (R. 3315–3316).

The salesmen, who worked until 10 or 11 in the evening (R. 2965), received as commission at first 10% and later 12% of their gross sales to customers (R. 2967, 3228, 3230). Petitioner worked for Kimball for ten days and received $486 in commissions (R. 3238).

King, the victim, testified that after receiving the descriptive literature, he was called at home by petitioner from New York (R. 3146) at 6 or 7 p.m., C.S.T. (R. 3147). Petitioner told him that he had received his name from a friend and that he was calling to let him in on some of the Mark stock (R. 3148). He said that he was staying late at the office to make these calls, as he did not think there was much time left to get the stock before it was too late (R. 3150). He

described Mark as an old reliable company that was in mining and was going to merge with a helicopter company (R. 3148), and said that the stock was a safe investment which had gone up 25¢ since Kimball had acquired it and would double in thirty days (*Ibid.*; R. 3150, 3178). He described Kimball as just as reliable as Merrill Lynch, Pierce, Fenner and Smith, and told King that he (petitioner) would make money on the transaction only if King did also, that to be a Kimball customer King had to make a profit (R. 3149). He added that he would advise King when to sell and when to buy (R. 3148).

Petitioner also told King that Mark was listed on the New York Stock Exchange (R. 3149, 3177, 3179), although he later admitted to an S.E.C. investigator that no one had ever informed him that Mark was listed on any exchange or that there was any possibility that it would be listed (R. 3277).

King further testified that petitioner called him again two or three days after the first transaction, insisting that he buy more Mark stock because it looked like a "sure thing." He stated that when he thereafter tried to dispose of the stock through a local brokerage firm, he was told by the firm that the stock was offered at 40¢ with no takers (R. 3153).

Petitioner's call to King was verified by telephone company records, which showed a call to King from a "Mr. Gordon", at petitioner's home number (R. 3277) but charged to Kimball's number, on the day that King said he received the call (R. 3305–3306).

2. Testimony was also received from one Perry V. Gentzel, who had been sold almost $12,000 worth of

Mark stock (R. 3245, 3247, 3251) and had been sent a confirmation slip for almost $10,000 more that he had not ordered (R. 3251–3252). The salesman with whom he dealt, identifying himself as "Norman Thomas" (R. 3243),[3] told Gentzel that he would recoup his money in six months and still retain the stock (R. 3246) and that he could sell it back to Kimball at any time (R. 3249). When Gentzel tried to sell it back he was unable to do so (R. 3251–3252). Gentzel, like King, was told that the stock was listed on the New York Stock Exchange (R. 3248).

These transactions had taken place after petitioner had left Kimball's employ (R. 3243), but during the period when co-defendant Ross was working (R. 3253). The testimony, which was admitted subject to connection (R. 3244), was offered by the Government on the theory that it showed the existence of a general scheme to defraud involving several participants, a fact relevant at least as to Ross (R. 3243).[4] At its completion, the court stated in the jury's hearing that it contributed nothing to the case (R. 3256–3258). Neither petitioner nor Ross cross-examined Gentzel (R. 3257), and no motion was made at that time to strike his testimony. At the conclusion of the case, when the conspiracy count was struck, a motion was

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[3] No person named "Norman Thomas" worked as a Kimball salesman (R. 2968, 3275). Testimony of Kimball's secretary-treasurer, admitted over the limited objection that it called for a conclusion was that the salesmen could have used names other than their own in making calls (R. 2967).

[4] There was, moreover, a possible inference that Ross was "Thomas" since telephone company records indicated that the call to Gentzel was made by him (R. 3308–3309).

made to strike the testimony, but the court held that it could be relevant to the counts charging a scheme, and that it would remain in the record to the extent relevant (R. 3459). The court, in its instructions to the jury, made no specific reference to the Gentzel testimony, but did instruct that the jury, in order to convict, would have to find as to each defendant that he made representations to the particular person charged in the indictment that he knew the representations to be false, and that he made them as part of a scheme to defraud (R. 3632–3633). There were no exceptions taken to the instructions (R. 3640).

ARGUMENT

1. There was clearly sufficient evidence to sustain the jury verdict. The telephone company records fairly establish that it was petitioner who made the call to King. It is "extremely remote or highly improbable that anyone other than" petitioner would have made a sales call to King from petitioner's home telephone, charging the call to Kimball, and announced himself to be petitioner. *United States* v. *Lo Bue*, 180 F. Supp. 955, 956 (S.D.N.Y.); see also *Jarvis* v. *United States*, 90 F. 2d 243, 245 (C.A. 1), certiorari denied, 302 U.S. 765; *Andrews* v. *United States*, 78 F. 2d 274, 275 (C.A. 10); *Van Riper* v. *United States*, 13 F. 2d 961, 968 (C.A. 2), certiorari denied *sub nom. Ackerson* v. *United States*, 273 U.S. 702. As for scienter, petitioner's own admission when interviewed by the S.E.C. investigator established his knowledge of the falsity of his representation in regard to the listing on the New York Stock Exchange; the fact that he received commissions proved that he knowingly mis-

represented to King that the latter had to make money in order for him to do so; and the jury could properly find from all the circumstances that petitioner did not believe, as he represented, that Mark was an old reliable company, that the value of the stock would double in thirty days, or that Kimball was just as reliable as Merrill Lynch, Pierce, Fenner and Smith. All of these representations were clearly of a nature to induce a customer to purchase the stock that was offered.

2. Petitioner had a fair trial. The admission of the testimony of Kimball's secretary-treasurer describing the company as a "boiler room" was not error; the jury could properly consider this accurate description as one factor in determining whether petitioner must have been aware, from all the circumstances, that the stock he was selling was valueless. As for the witness's further testimony concerning the use of assumed names, no objection was raised to it on the grounds of relevance or materiality, and, moreover, the testimony was relevant and necessary to explain how a person apparently not employed by Kimball could have made the calls to Gentzel. Gentzel's testimony was relevant to show that the representations made by petitioner and Ross were not isolated instances of fraud, but were part of a general scheme to defraud with which the two had associated themselves. Compare *Blue* v. *United States*, 138 F. 2d 351 (C.A. 6), certiorari denied, 322 U.S. 736, 737; *Reistroffer* v. *United States*, 258 F. 2d 379, 387-388 (C.A. 8), certiorari denied,

358 U.S. 927. Moreover, any possible prejudicial effect was cured by the court's instructions, to which no addition was requested nor exception taken, emphasizing the particular finding necessary as to each defendant to support a verdict of guilty. Finally, as the court of appeals noted, the court commented in the presence of the jury on the lack of value of the evidence.[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1963.

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[1] The sharp reprimands directed by the court to petitioner's counsel of which he complains appear to have been merited by counsel's time-consuming practices (see R. 2693, 3027–3028, 3033–3035, 3054, 3076) and his lack of professional decorum (see R. 3035; 3226–3227). But, in any event, whatever hostility the court displayed was, as the court of appeals noted, directed solely at counsel and did not prejudice petitioner's case.

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